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No. 94-1280

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In The

Supreme Court of the United States

October Term, 1994

CHARLES R. WILLMAN, M.D.,

Petitioner,

v.

HEARTLAND HOSPITAL EAST, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTION PRESENTED

Respondents respectfully suggest that the issues framed by petitioner are more accurately stated as follows in a single issue:

> Whether an antitrust conspiracy could be reasonably inferred solely from the discipline petitioner received as a result of medical peer review proceedings, when independent evidence, including testimony from petitioner's own experts, shows that the peer review committees had before them evidence that petitioner repeatedly provided substandard care to his patients.

RULE 29.1 LISTING

Respondent Heartland Health Systems, Inc., a not-for-profit Missouri corporation, is the sole member (parent) of Heartland Hospital, which is also a Missouri not-for-profit corporation with East and West Campuses. There are no other corporate relationships in this case.

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STATEMENT OF THE CASE

Respondents incorporate by reference the factual statements in the opinions of the district court (Pet. App. B at A-16 – A-19) and the court of appeals (Pet. App. A at A-2 – A-6).

REASONS FOR DENYING THE WRIT

There are two threshold grounds for denying the writ that make it unlikely the Court would ever reach the

issues framed by petitioner. First, there was a well-recognized alternative ground – the intracorporate immunity doctrine – that the Eighth Circuit did not address, but that alone required judgment for the respondents. Second, the passage of the Health Care Quality Improvement Act of 1986, 42 U.S.C. § 11101-11152, makes it unlikely that the exact questions raised by petitioner will arise again. In any event, the two issues petitioner does raise – that the courts below misapplied both the rule of reason and the summary judgment standard of *Eastman Kodak*[1] – lack merit, as does petitioner's passing allegation that a conflict exists among the Circuits.

I. The Intracorporate Immunity Doctrine Bars Petitioner's Section 1 Claims And Makes It Unlikely The Court Would Reach Petitioner's Issues

The intracorporate immunity doctrine was an alternative ground supporting the district court's grant of summary judgment.[2] This well-recognized doctrine, now adopted in three Circuits, supports the judgment below for respondents wholly apart from the issues raised by petitioner.

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[1] *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 112 S. Ct. 2072 (1992).

[2] *See Willman v. Heartland Hosp. East*, 836 F. Supp. 1522, 1527 (W.D. Mo. 1993) (Pet. App. B at A-23). The Eighth Circuit found it unnecessary to reach this issue. *Willman v. Heartland Hosp. East*, 34 F.3d 605 (8th Cir. 1994) ("We need not decide whether a hospital can conspire with its medical staff, for even if we assume that the defendants had the capacity to conspire with their medical staffs, we conclude that Willman's section one claim fails." *Id.* at 610; Pet. App. A at A-8.

Petitioner attempted to find an antitrust conspiracy between the hospitals and their respective medical staffs to deprive him of his staff privileges. But the hospitals and the medical staffs are more properly considered a single economic entity when conducting peer review proceedings, so that no Section 1 violation could have occurred as a matter of law.

Section 1 of the Sherman Act does not prohibit unilateral conduct; there must be a "contract, combination . . . or conspiracy" between separate entities to support a violation. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984). The Court in *Copperweld* reaffirmed that a corporation was incapable of combining or conspiring with its own officers or with its unincorporated divisions. *Id.* at 769-71. The Court was careful to note that "substance, not form, should determine whether a separately incorporated entity is capable of conspiring under § 1." *Id.* at 773 n.21. Using this same "substance, not form" analysis, the Court extended the immunity doctrine to corporations and their wholly owned subsidiaries:

> A parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common, not disparate; their general corporate acts are guided or determined not by two separate corporate consciousnesses, but one.

Id. at 771.

The clear majority of cases have held that the intracorporate immunity doctrine of *Copperweld* applies to bar Section 1 challenges to peer review proceedings. In one of the leading decisions, *Oksanen v. Page Memorial Hosp.*, 945

F.2d 696 (4th Cir. 1991), *cert. denied*, 502 U.S. 1074 (1992), the *en banc* Fourth Circuit recognized that a hospital and its medical staff could not conspire in the peer review process:

> The decision to conduct the peer review process does not represent the sudden joining of independent economic forces that section one is designed to deter and penalize. "There are no strong antitrust concerns that would warrant a departure from traditional concepts of agency since the hospital and medical staff are not competitors." Far from being a competitor with the hospital, the medical staff was in fact a natural component of the hospital's management structure.

Id. at 703 (citations omitted).

Oksanen is in accord with decisions by both the Third and Sixth Circuits. *See Nanavati v. Burdette Tomlin Memorial Hosp.*, 857 F.2d 96, 118 (3d Cir. 1988) (hospital cannot conspire with its medical staff), *cert. denied*, 489 U.S. 1078 (1989); *Nurse Midwifery Ass'n v. Hibbett*, 918 F.2d 605, 614 (6th Cir. 1990) ("[T]he intracorporate conspiracy doctrine prevents a finding of conspiracy between a hospital and its medical staff . . . "), *cert. denied*, 502 U.S. 952 (1991); *see also Weiss v. York Hosp.*, 745 F.2d 786, 817 (3d Cir. 1984) (hospital could not conspire with medical staff as a matter of law because, "with regard to these [peer review] decisions, the medical staff operated as an officer of a corporation would in relation to the corporation."), *cert. denied*, 470 U.S. 1060 (1985).

Here Missouri law required the respondent hospitals to use members of their medical staffs to conduct ongoing

evaluations of the quality of medical care. 13 Mo. C.S.R. 50-20.021(2)(C)(10) (1982). The medical staff bylaws at both hospitals required physicians who were members of the medical staffs to serve on "peer review committees" as that term is defined in Missouri's peer review statute, R.S. Mo. § 537.035(2) (1985). The individual physicians conducting peer review were thus effectively serving as the hospitals' agents or officers in evaluating the quality of medical care. These peer review proceedings were therefore conducted with a "complete unity of interest" between the hospitals and the individual physician defendants, and no conspiracy was possible. *See Copperweld*, 467 U.S. at 771; *Oksanen*, 945 F.2d at 703.

The respondent hospitals were not sufficiently separate from their medical staffs during peer review proceedings to support a Section 1 Sherman Act violation. The trial court properly granted summary judgment on this ground. 836 F. Supp. at 1522; Pet. App. B at A-23. This alternative ground supporting the judgment makes it unlikely that the Court would ever reach the issues now raised by petitioner.

II. The Health Care Quality Improvement Act of 1986, 42 U.S.C. §§ 11101-11152, Which Became Effective After The Events Giving Rise To The Present Suit, Makes Petitioner's Issues Inconsequential

There is a second reason why this case does not require the Court's attention. After the events giving rise to the present suit, Congress enacted the Health Care Quality Improvement Act of 1986, 42 U.S.C. §§ 11101-11152 (1986) ("HCQIA"). This Act makes it

unlikely that the issues raised by petitioner will arise again, at least in the unique factual circumstances presented here.[3]

The HCQIA grants immunity to medical professionals who, like respondents, engage in legitimate peer review proceedings. *See* 42 U.S.C. § 11111. The Eighth Circuit succinctly summarized the future effect of this Act, even as it recognized the Act could not retroactively apply to the present facts:

> Recognizing that the possibility of antitrust liability may impede effective peer review, Congress enacted the Health Care Quality Improvement Act of 1986. 42 U.S.C. §§ 11101-11152. The Act immunizes medical peer review from antitrust liability if the challenged action is taken "in the reasonable belief that [it] was in the furtherance of quality health care." *Id.* § 11112(a). We need not consider the impact of the Act on Willman's claims, for the Act was enacted after the events at issue in this case and is not retroactive.

34 F.3d at 611 n.3; Pet. App. A at A-9 n.3.

Future cases alleging antitrust liability based on peer review proceedings will probably turn on the immunity provisions of the HCQIA. Petitioner's issues are therefore not likely to recur. The Court should not devote its limited resources to such narrow questions.

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[3] Petitioner's effort to explain this fact-specific case consumes more than twelve pages in his petition.

III. The Eighth Circuit Did Not Misapply The Rule of Reason

Petitioner misconstrues the Eighth Circuit's opinion in the two issues he frames for the Court. The opinion below did not, as petitioner claims, show a "refusal to apply the Rule of Reason." Pet. Br. at 18. Far from rejecting the rule of reason, the Eighth Circuit simply recognized, as this Court has taught, that the range of permissible inferences from ambiguous evidence is limited in a Section 1 case. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986).

Petitioner makes much of the fact that the Eighth Circuit deemed it immaterial whether Dr. Willman was a competent physician. Petitioner essentially ignores the extensive analysis conducted by both courts below, an analysis that finds ample support in past precedent of this Court.

Petitioner's case was based entirely on circumstantial evidence. Simply because he was disciplined by peer review panels at two hospitals, petitioner sought to draw an inference of an antitrust conspiracy. But, as the Eighth Circuit recognized, the record at those peer review proceedings *supported* the decisions to discipline petitioner:

> Physicians who were not affiliated with the hospital defendants and who did not practice in St. Joseph and therefore did not compete with Willman agreed that in some cases Willman had rendered care that was below the acceptable standard. For example, Dr. Ben McCallister, a board-certified internist and cardiologist, reviewed the charts of nine of Willman's patients and found that three of these patients

> had received substandard care. Dr. Paul Koontz, a board-certified general surgeon, reviewed eight of Willman's charts and found that Willman's care was deficient in four cases. Dr. Alfred Gervin, who is board certified in general surgery, critical care medicine, and emergency room medicine, concluded that in twenty-three of the thirty-four charts that he had reviewed, Willman had either violated the acceptable standard of care or had rendered "terrible care." Dr. Kenneth Mattox, a board-certified general surgeon and thoracic surgeon, reviewed only the Fanning case and concluded that Willman's "lack of understanding of the potential ramifications to the patient, coupled with his actual mismanagement and mistreatment of the patient, demonstrate a careless and reckless disregard for the patient." Indeed, one of Willman's medical experts concluded that "some of the cases, you know, represent outer edges of what we perceive as standard of care."

34 F.3d at 611; Pet. App. A at A-9 – A-10.

The Eighth Circuit correctly noted that on this record the ultimate question was not whether Dr. Willman was a competent practitioner. The question was instead whether, in this antitrust case, a reasonable factfinder could infer the existence of a conspiracy from the defendants' participation in peer review proceedings, when the evidence at those proceedings disclosed legitimate medical reasons for disciplining Dr. Willman:

> Corrective action against a physician does not violate the antitrust laws if the physician's peer reviewers had legitimate medical reasons to believe that the physician provided substandard care. *Johnson*, 964 F.2d at 121 [*Johnson v. Nyack*

> *Hosp.*, 964 F.2d 116 (2d Cir. 1992)]. On the other hand, a factfinder may infer the existence of an illegitimate motive if the peer group's conclusions are so baseless that no reasonable medical practitioner could have reached those conclusions after reviewing the same set of facts.' *Bolt v. Halifax Hosp. Medical Ctr.*, 891 F.2d 810, 821 (11th Cir. 1990). "[A]ntitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986). Conduct that is as consistent with a lawful motive as with an unlawful motive, standing alone, does not support the inference of an antitrust conspiracy. *Id.*; *see also Lovett v. General Motors Corp.*, 998 F.2d 575, 579 (8th Cir. 1993). Although Willman submitted affidavits to the contrary, we conclude that the opinions of Drs. McCallister, Koontz, Gervin, and Mattox established that the peer group's conclusions were not so baseless as to permit the inference of improper motive. Accordingly, we conclude that the limitation and eventual termination of Willman's staff privileges, in light of the conflicting medical opinions regarding the acceptability of Willman's care, is as consistent with the lawful motive of promoting quality patient care as with an anticompetitive motive and therefore, without more, does not give rise to an inference of an antitrust conspiracy.

34 F.3d at 611; Pet. App. A at A-10 – A-11.

This was not a "refusal to apply the rule of reason." It was a straightforward application of existing antitrust precedent to a narrow factual setting. There was nothing

remarkable about the lower court's analysis that would require the Court's attention.[4]

IV. The Eighth Circuit Did Not Misapply The Standard For Summary Judgment

Petitioner also misconstrues the opinion below in arguing that the Eighth Circuit failed to apply the proper summary judgment standard. This argument wrongly assumes that the issue for resolution was whether petitioner was a competent physician.

As noted above, the issue on which summary judgment was granted was petitioner's antitrust claim, not the issue of whether petitioner provided competent medical care. Petitioner's reliance on broad pronouncements from the *Eastman Kodak* opinion cannot change this basic fact. Under *Matsushita*, petitioner had the burden of producing evidence to show that the inference of the antitrust conspiracy he sought to draw was reasonable. 475 U.S. at 588. As the Eighth Circuit correctly noted, however, petitioner failed to do this: his evidence was just as consistent

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[4] Petitioner also suggests in passing that the opinion below conflicts with the Third Circuit's opinion in *Miller v. Indiana Hosp.*, 843 F.2d 139 (3d Cir.), *cert. denied*, 488 U.S. 870 (1988). This is incorrect. The court of appeals below never adopted an across-the-board "substantial evidence" test for evaluating all peer review decisions, as did the district court in *Miller*. *See* 843 F.2d at 142. Petitioner's own arguments, moreover, emphasize the factual discrepancies between *Miller* and the present case. *See* Pet. Br. at 25. In any event, the *Miller* court, like the Eighth Circuit below, expressly noted the potentially overriding impact of the HCQIA on future peer review cases. *See* 843 F.2d at 143 n. 4.

with the lawful, procompetitive goal of advancing quality patient care as it was with some alleged antitrust conspiracy. 34 F.3d at 611. Thus, "without more," petitioner's evidence "does not give rise to an inference of an antitrust conspiracy." *Id.*

The opinion below is not at odds with either *Eastman Kodak* or *Matsushita*. Petitioner's second point also does not warrant the Court's attention.

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit should be denied.

Respectfully submitted,

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